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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington,
Appellants,

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON-KIER COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REVISED REPLY BRIEF AND ADDITIONAL AUTHORITIES

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ADDITIONAL AUTHORITIES

Similar laws of other states.

During the first argument appellants' counsel was asked what, if any, other states had adopted

compensating or "use" tax measures similar to that of Washington. Investigation shows that California, Colorado, Oklahoma and Ohio have enacted similar general measures, and North Carolina, a "use" tax applicable only to automobiles.* Of course most of the states have adopted similar "use" taxes applicable to gasoline.

Suggestion that full tax attaches though "use" be brief.

Answering this observation by a member of the court, it was pointed out during the first argument that this would be likewise true of a property tax levied annually. If present in the state on the assessment date, personal property is subject to the entire annual tax, though removed the next day. The following is quoted from *Aero Transit Co. v. Georgia Commission*, 295 U. S. 285, 289:

"The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. * * * The fee is for the privilege of a use as extensive as the carrier wills that it shall be. * * * One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

Viewed as an excise, compensating tax not violative of commerce clause.

To the cases cited under this head in our opening brief (pp. 16 *et seq.*) may we add *Monamotor*

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*See Ch. 361, Laws of Cal. 1935; Laws of Colo. 1936, H. B. 13, 2nd Ex. Sess.; Ch. 66, Art. 7, sec. 4(j), Laws of Okla. 1935; Laws of Ohio, 1st Special Sess. 1935, H. B. No. 590 (Secs. 5546-25 to 5546-47, Ohio Gen. Code); Ch. 371, art. V, sec. 404, subsec. 18, Laws of N. C. 1935.

Oil Co. v. Johnson, 292 U. S. 86, holding that a state may impose a tax on the local use of gasoline imported from without the state.

Off-set of "use" and sales taxes already paid designed to avoid double taxation.

In our opening brief (pp. 30-31) we pointed out that while perhaps two or more states may each constitutionally impose a separate tax upon the same article for the same period, yet a state tax measure so framed as to avoid such onerous result, should not be condemned as discriminatory.

In *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326, holding a state statute imposing a tax for the privilege of using motor vehicles within the state not to violate the commerce clause as applied to automobiles purchased outside, and brought into, the state, the court said with respect to a similar off-set provision:

"When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself, 'to avoid in effect double taxation' on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination where there is equality." (186 S. E. 329.)

In the recent case of *Colgate v. Harvey*, 296 U. S. 404, 420, it was said:

"Thus, the tendency of the plan is to avoid taxing twice what is, in effect, the same thing. And conceding the power of the state to impose double or even multiple taxation, legislation which is calculated to avoid that undesirable result certainly cannot be condemned as arbitrary."

REPLY BRIEF

Appellees' contention that compensating tax is in effect sales tax because exacted only on use of goods purchased.

The tax is exacted, not on the sale or the privilege of making a sale, but upon the privilege of use within the state. True, the tax is imposed only as to property purchased at retail, but this limitation is for the obvious purpose of avoiding discrimination in its application as the complement of the retail sales tax imposed only with respect to articles purchased at retail. One acquiring tangible personal property other than by purchase at retail is exempted from the operation of both the sales and compensating taxes. But he is subject to both with respect to articles purchased at retail for the purpose of transformation into some other article, as, for instance, steel and wood for the construction of a machine.

As a matter of fact, purchases at retail, as defined by the act, include virtually all property acquired by the user *except such as he himself produces.*

Thus, section 35 provides:

"For the purposes of this title:

* * * * * * *

"(b) The meaning ascribed to words and phrases in titles II and III * * * insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this title * * *." (Laws 1935, ch. 180.)

Section 5(d), title II, provides:

"(d) The term 'sale at retail' or 'retail sale' means every sale of tangible personal property other than a sale to one who purchases for the purpose of resale in the regular course of business or for the purpose of consuming the property purchased in producing for sale a new article or substance, of which such property is an ingredient or component, or a chemical used in processing same. The term shall not be construed to include sales of fede to persons producing for sale milk, eggs, wool, fur, meat or other substances obtained from livestock, animals or poultry." (Laws 1935, ch. 180.)

It is apparent, of course, that one proposing to use an article must either purchase it at retail as so defined or produce it himself. Even if received as a gift it must have been purchased by the donor, and its subsequent "use" by the donee would be taxable. In other words, the tax act would be no more comprehensive in its application were it exacted for the privilege of use of all tangible personal property acquired, but expressly exempting such property as the user himself produced.

Appellees' counsel make no contention that the tax offends the equal protection clause because the user is not taxed for the use of his own products. Nor could they, in view of the well-recognized wide range and flexibility of the state's power to classify for purposes of taxation. *Colgate v. Harvey*, 296 U. S. 404, 422-3; *Ohio Oil Co. v. Conway*, 281 U. S.

146, 159; *Tax Commissioners v. Jackson*, 283 U. S. 527, 537, and numerous cases reviewed.*

May we add that in the present age so infrequently do either persons or corporations make use of tangible personal property of their own production, that a claim of discrimination could scarcely be based on their exemption from the tax.

"Inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Bugbee*, 250 U. S. 525, 543; *Colgate v. Harvey*, 296 U. S. 404, 436.

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* In this connection, may we call attention to the following decisions sustaining taxes attacked as discriminatory under the equal protection clause:

Pacific Express Co. v. Seibert, 142 U. S. 339, (tax on express companies shipping over railroads and steamboat companies, but exempting other companies carrying express matter in vehicles of their own);

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, (tax on persons and corporations carrying on the business of refining sugar and molasses, but exempting planters and farmers grinding and refining their own sugar and molasses);

Cook v. Marshall County, Iowa, 196 U. S. 261 274-5, sustaining classification as between retail and wholesale dealers in cigarettes;

Armour & Co. v. Virginia, 246 U. S. 1, 6, sustaining classification as between manufacturer selling his goods at place of manufacture and one engaged as a merchant in selling goods of his manufacture elsewhere than where made;

Broad River Power Co. v. Query, 288 U. S. 178, 180, (tax on production and sale of electricity, but exempting industrial plants generating electricity for own use and that of employes);

Continental Baking Co. v. Woodring, 286 U. S. 352, (tax on motor vehicles, but exempting transportation of livestock and farm products to market by the owner or supplies for his own use in his own motor vehicle); and *Hicklin v. Coney*, 290 U. S. 169, and *Aero Mayflower Transit Co. v. Georgia Public Service Com.*, 295 U. S. 285, holding substantially to the same effect.

Appellees' contention that offending tax was imposed to avoid effect of commerce clause.

As elsewhere pointed out, appellees' counsel argue that the compensating tax was imposed because the state legislature recognized its inability to tax interstate sales.

But even if true, the tax, we submit, is not to be condemned on this account. The court must assume that in enacting the entire Revenue Act of 1935 the legislature had in mind every limitation with respect to taxation contained in both the state and federal constitutions, and embodied therein only such exactions as were believed lawful. The court must likewise assume that in enacting such measure the legislature made every effort to avoid discrimination as between its citizens. *A retail sales tax alone would have produced "gross inequality and injustice" as between those making local purchases and those making ultra-state purchases. Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 174; *Woodruff v. Parham*, 8 Wall. 123, 137. If the legislature imposed the "use" tax to avoid such inequality and injustice, can it be condemned for so doing? We submit not. The commerce clause does not prevent the exaction by a state of a non-discriminatory property tax on goods brought from other states. Neither, we submit, does it prevent the exaction of permissible state excises which are designed to, and do avoid discrimination as between the residents of such state.

Thus, in *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 477, the "use" tax was imposed because, as Your Honors found, the state legislature realized "that large users of gasoline either were evading or would evade the" sales tax imposed "by bringing in gasoline in quantities from without the state, and storing it for their own purposes." And the legislative purpose, though not expressly recited, was no less plain in the other analogous cases sustaining "use" taxes as complements of a retail sales tax. *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86; *Hart Refineries v. Harmon*, 278 U. S. 499.

If then, in the exaction of the "use" tax, the legislative purpose was to avoid discrimination, should it not be lauded rather than condemned? May we here repeat the following excerpt quoted in our opening brief (p. 21) from *Hinson v. Lott*, 75 U. S. 148, 153:

"As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, *but an appropriate and legitimate exercise of the taxing power of the states.*" (Emphasis supplied.)

If, in the exaction of taxes, the legislature may classify as between property which has, and property which has not, borne its fair share of the tax

burden (*Watson v. State Comptroller*, 254 U. S. 122, 125), then obviously no legitimate complaint can be made of complementary tax measures designed to avoid discrimination in the taxes payable by the residents of a state.

Appellees' contention that tax commission clothed with authority to declare purpose of tax.

In their brief, appellees' counsel use as their principal text the tax commission's statement that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination," etc. (R. 28).

Anticipating this, we pointed out in our opening brief (pp. 27-8) that the delegated power to make rules and regulations conferred upon the tax commission no authority to declare the legislature's motive in the enactment of the offending tax measure.

But the short and conclusive answer to appellees' contention is, we submit, that the purpose of a *lawful* tax is not a proper subject of judicial inquiry.

Answering the contention that a contested tax of 15 cents a pound on butter substitutes sold within the state had been enacted for the purpose of fostering the sale of butter and repressing the sale of oleomargarine, Your Honors said in *Magnano v. Hamilton*, 292 U. S. 40, 44:

"Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry."

And the above language was repeated in *Fox v. Standard Oil Co.*, 294 U. S. 87, 100-101.

In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, a Pennsylvania statute imposing a tax on anthracite coal of 1½% of its value when prepared for market was assailed as an unlawful attempt to burden interstate commerce in that by levying such tax, Pennsylvania, having virtually a monopoly on anthracite, would be levying a tribute upon the consumption of other states. In emphasis of this contention, the governor of the state was quoted as urging the tax because of that effect. But Your Honors said (pp. 258-9):

"The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the governor of the state of its effect upon consumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, * * *."

Prior to 1908 Ohio imposed an excise tax on railroads measured by 1% of their gross receipts, both inter- and intrastate. In May, 1908, this court held a Texas tax of this kind invalid as to interstate receipts. (*Galveston, etc. Ry. Co. v.*

Texas, 210 U. S. 217.) In 1910 Ohio passed a new tax measure imposing an excise on railroads measured by 4% of their intrastate gross receipts only. In *Ohio Tax Cases*, 232 U. S. 576, it was contended that such four-fold increase in the tax rate as applied to intrastate receipts was made, not as a true measure of the privilege granted, but because of the state's inability to impose the tax on interstate receipts. But answering this contention, Your Honors said (pp. 592-3):

"The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the state legislature. * * *

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the state as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation."

We must conclude, therefore, that the legislative purpose in imposing a lawful tax is not material. Were the rule otherwise, it would, we submit, most certainly have been applied in those cases sustaining special taxes imposed with respect to

goods not produced locally. See *Texas Co. v. Brown*, 258 U. S. 466, 476; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Magnano v. Hamilton*, 292 U. S. 40.

But should we assume it proper to inquire into the legislative purpose of the tax, no reason suggests itself why the court should look further than section 2 of the 1935 Revenue Act which thus declares the purpose of all the various taxes imposed thereby:

"The limitations on the taxing power of the various municipalities of the state make it imperative that the state assume a larger part of the expense necessary to provide reasonable support for public education and for the care of indigent persons and the unemployed. To meet the obligations so imposed, and better to distribute the burden of taxation, the State of Washington hereby declares its purpose to levy a tax on persons engaged in business activities and upon commodities, estates and gifts as enumerated in this act and in the manner hereinafter in this act set forth." (Sec. 2, Chap. 180, Laws of Wash. 1935.

Appellees' contention that offending tax raises economic barrier between Washington and other states.

Plaintiffs' counsel rely chiefly on *Baldwin v. Selig*, 294 U. S. 511, condemning a New York statute prohibiting the retailing of milk of ultra-state origin if purchased from the producer at a price less than the minimum fixed by statute to be paid domestic producers. Said the court (p. 521):

"New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of

Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not."

In other words, New York said to the Vermont farmers:

"Your milk shipped to New York cannot be sold there unless you charge the same price for milk in Vermont as is paid New York producers!"

Obviously such a law would as effectively bar interstate commerce as would a tariff wall. But this is not true of the compensating tax statute. By this act, Washington says to all concerned:

"You may ship into Washington all the goods you like at any price you like, provided that when used in Washington, such goods shall be subjected to the same tax for the support of state government as goods purchased in that state."

Here, we submit, is no economic barrier. Never has it been considered that the exaction by a state of a non-discriminatory tax on goods as to which interstate commerce has ended, creates an economic barrier. As was said in *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 575:

"A system of taxation discriminating in favor of residents and domestic products and against non-residents and foreign products might result in commercial non-intercourse between the states, and as a regulation of interstate commerce would clearly be invalid. The objection, however, would not apply to a uniform tax upon goods which does not discriminate in favor of residents or products of the state. *Woodruff v. Parham*, 8 Wall. 123; *Hin-*

son v. Lott, 8 Wall. 148; *Emert v. Missouri*, 156 U. S. 296."

Baldwin v. Selig, *supra*, was not, we submit, intended to overrule *Gregg Dyeing Co. v. Query*, 286 U. S. 472; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Hart Refineries v. Harmon*, 278 U. S. 499, and *Monamotor Oil Co. v. Johnson*, 292 U. S. 86.

Appellees' counsel seem to argue that goods of ultra-state origin are not only immune from discriminatory taxation, but are entitled to exemption from taxes lawfully imposed on articles of domestic origin.

But interstate commerce is not, we submit, burdened simply by failure to subsidize. Washington cannot burden interstate commerce, but neither can she be criticized for failing to place a bounty on such commerce by exempting its subjects from taxes it may lawfully impose. To do so would itself result in palpable injustice and discrimination with respect to its own citizens. Said Your Honors in the recent case of *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 174-5, in sustaining a gallonage tax with respect to gasoline shipped from an outside state in compliance with a contract made within the taxing state:

"The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxa-

tion and produce gross inequality and injustice. *Woodruff v. Parham*, 8 Wall. 123, 137. The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein. * * *

"Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. * * * (citing cases) * * * And as the rule applies whether the burden falls directly or indirectly (*Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property."

The commerce clause, we submit, was intended to prevent burdensome state restrictions on interstate trade—not to destroy local trade, by granting exemptions and immunities with respect to goods simply because acquired in interstate commerce.

Appellees' contention that merchants of states imposing no sales tax may be burdened with the equivalent in other taxes.

It is urged that the Oregon merchant, for instance, because relieved of a sales tax, may be subject to a correspondingly increased property or income tax.

The short answer is, of course, that the sales and "use" taxes are imposed by Washington on its own citizens to raise revenue required for its own purposes. The constitutional provisions as to free-

dom of interstate commerce, most certainly cannot demand that each state's taxation policy be circumscribed by the taxation methods of sister states.

The tax is imposed, not on the Oregon merchant, but upon the use of property in Washington. If Washington has avoided discrimination so far as its own tax laws are concerned, the constitutional requirements should, we submit, be satisfied.

Moreover, counsel's argument is unsound. The Oregon merchant may not have a taxable net income. Nor is he likely to pay a property tax on any considerable proportion of his normal stock. Self-interest induces low inventories on the assessment date. Besides, a merchant with a frequent turn-over obviously pays a property tax on only a fraction of his annual sales.

Appellees' contention that compensating tax designed to attach before interstate commerce ceases.

Of course there is nothing in the act remotely indicating any such legislative purpose. No such construction was given to the act by the state supreme court in sustaining the tax. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317.

That no attempt is made to collect the tax with respect to articles while still subjects of interstate commerce, is sufficiently evidenced by the following statement in the tax commission's letter to plaintiff (R. 34):

"You are advised that tax liability * * * arises at the time tangible personal property is put

to use within the State of Washington. Such property is put to use by the first act *after delivery is completed within the state* by which the article purchased is actually used or made available for use with intent actually to use the same within the state." (Emphasis supplied.)

No injunction should issue unless the administrative officers in collecting the tax, are actually invading plaintiff's constitutional rights. *Edelman v. Boeing Air Transport*, 289 U. S. 249.

It is well settled, of course, that where to construe a state statute as applicable to interstate commerce would make it unconstitutional as a regulation of such commerce, it will be held, if possible, to apply only to commerce wholly within the state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356, note 75.

Moreover, even could the act be construed as imposing the tax liability before the property's interstate journey has finally ended, it is apparent that the offending provisions could and should be eliminated without affecting the unobjectionable features.

"A statute which affects and regulates both interstate and intrastate commerce is not necessarily wholly invalid. It will be sustained and enforced so far as it affects commerce wholly within the state, provided the allowed and prohibited parts are severable." Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356.

In any event, plaintiffs are in no position to claim exemption from the tax on the ground urged, since they expressly allege that the articles for the use of which the tax is here sought to be imposed were "used in and about and for the purposes of the construction of the Grand Coulee Dam." (R. 11.)

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it; that is, a legal interest in defeating it. The objection to the constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Vol. 4, Ency. U. S. Sup. Crt. Rep., p. 74, and Supplement.

For the reasons urged in this and our opening brief, we respectfully submit that the order granting the interlocutory injunction should be reversed.

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